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No. : 02-626

In the

Supreme Court of the United States

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,

Petitioner,

-v-

MICCOSUKEE TRIBE OF INDIANS, et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* TROUT UNLIMITED INC., CATSKILL MOUNTAINS CHAPTER OF TROUT UNLIMITED, INC., THEODORE GORDON FLYFISHERS, INC., CATSKILL-DELAWARE NATURAL WATER ALLIANCE, INC., FEDERATED SPORTSMEN'S CLUBS OF ULSTER COUNTY, INC., RIVERKEEPER, INC., IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the transfer of water already containing pollutants resulting from human activities, from one water body to another water body not containing those pollutants, in violation of State-established water quality standards, constitutes an "addition" of pollutants requiring a National Pollutant Discharge Elimination System (NPDES) permit under the federal Clean Water Act, 33 U.S.C. §§ 1301, 1342?

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

TABLE OF AUTHORITIES.....v

INTERESTS OF AMICI CURIAE.....1

SUMMARY OF ARGUMENT.....3

ARGUMENT.....5

I. TRANSFERS OF POLLUTED WATER THAT IS MOVED FROM ONE WATER BODY AND THEN DISCHARGED INTO A SEPARATE WATER BODY MEET THE CLEAN WATER ACT'S DEFINITION OF "DISCHARGE OF A POLLUTANT" FROM A "POINT SOURCE." 5

A. The Transfer of Polluted Water From One Water Body and its Discharge into a Separate Water Body by Means of a Point Source Meets the Plain Meaning of the CWA § 301 Prohibition Against the Unpermitted "Addition" of a "Pollutant" from a "Point Source" to "Navigable Waters.".....5

B. The Statutory Purpose, Legislative History and Structure of the Clean Water Act Compel a Conclusion that the Transfer of Polluted Water From One Body of Water and its Addition Into a Separate Body of Water Is a Discharge of a Pollutant from a Point Source.....8

C. *National Wildlife Federation v. Gorsuch* and *National Wildlife Federation v. Consumer's Power* Dealt Solely with Movement within a Water Body Segment, and Gave Inappropriate Deference to an Informal EPA Interpretation.....11

II. A HOLDING THAT DISCHARGES OF POLLUTED WATER INTO SPECIFIC WATER BODIES DOES NOT REQUIRE A NPDES PERMIT IF THAT WATER IS TRANSPORTED FROM A SEPARATE WATER BODY WILL RESULT IN THE SEVERE IMPAIRMENT OF WATER BODIES RECEIVING SUCH DISCHARGES.....13

A. If Point Source Discharges of Polluted Water Transferred From Separate Water Bodies Are Exempted From the CWA's Permit Requirement, Achieving Water Quality Standards in Some Water Bodies Receiving Such Discharges Will Become Impossible.....13

B. The Catskill Mountains Case Exemplifies The Need to Require Permits for Point Source Discharges of Polluted Waters in Order to Achieve Water Quality Standards.....15

C. A Proposed Transfer of Colorado River Water Further Illustrates the Extent to Which Transfers of Polluted Water Damage Water Quality.....18

III. THE ELEVENTH CIRCUIT'S OPINION IN MICCOSUKEE WILL ALLOW APPROPRIATE WATER QUALITY REGULATION WITHOUT INFRINGING ON STATE'S POWERS TO ALLOCATE WATER.....21

A. Clean Water Act Section 101(g) Presumes Legitimate Regulation of Water Quality.....22

B. The Clean Water Act Requires State Water Allocation System to Accommodate Legitimate Water Quality Controls.....23

C. Congress Never Intended to Preclude Regulation of Water Rights for Water Quality Protection.....25

CONCLUSION.....28

TABLE OF AUTHORITIES

Cases **Page**

Alameda Water & Sanitation Dist. v. Reilly, 930 F.Supp. 486 (D. Colo. 1996).....26

Catskill Mountains Chapter of Trout Unlimited v. City of New York, 244 F.Supp.2d 41 (N.D.N.Y. 2003) 16, 17

Catskill Mountains Chapter of Trout Unlimited v. City of New York, 273 F.3d 481 (2d Cir. 2001)..... *passim*

Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)..... 11

Christensen v. Harris County, 529 U.S. 576 (2000) 13

City of Thornton v. Bijou Irrigation Co., 926 P.2d 1 (Colo. 1996)..... 23

Connecticut Light & Power Co. v. Fed. Power Comm'n, 324 U.S. 515 (1945)..... 24

Dubois v. United States Dep't of Agric., 102 F.3d 1273 (1st Cir. 1996)..... 11

EPA v. California ex rel. State Water Res. Control Bd., 426 U.S. 200 (1976).....14

Miccosukee Tribe of Indians v. South Florida Water Management District, 280 F.3d

1364 (11th Cir. 2002)..... ... 1, 10

N. Plains Res. Council v. Fid. Exploration and Dev. Co., 325 F.3d 1155 (9th Cir. 2003)..... 7

Nat'l Wildlife Fed'n v. Gorsuch, 693 F.2d 156 (D.C. Circ. 1982)..... *passim*

Nat'l Wildlife Fed'n v. Consumers Power, 862 F.2d 580 (6th Cir. 1988)..... 11

PUD No. 1 v. Washington Dep't of Ecology, 511 U.S. 700 (1994)..... *passim*

Riverside Irrigation Dist. v. Andrews, 758 F.2d 508, 513 (1985)..... 25, 25

United States v. Akers, 785 F.2d 814 (9th Cir. 1986).....24

Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).....24

Statutes and Regulations **Page**

Federal Statutes

Rules of the Supreme Court of the United States, 28 U.S.C. Rule 37 (2003).....1

Clean Water Act, 33 U.S.C. § 1251(a)..... 4, 5, 8

Clean Water Act, 33 U.S.C. § 1251(a)(2)..... 14, 17

Clean Water Act, 33 U.S.C. § 1251(g)..... 4, 21, 22, 23

Clean Water Act, 33 U.S.C. § 1311..... 10

Clean Water Act, 33 U.S.C § 1311(a)..... 3, 5

Clean Water Act, 33 U.S.C. § 1312..... 10, 14

Clean Water Act, 33, U.S.C. § 1313..... 3, 10, 14

Clean Water Act, 33 U.S.C. § 1313(d)(4)..... 10

Clean Water Act, 33 U.S.C. § 1313(e)..... 14

Clean Water Act, 33 U.S.C. § 1315..... 14

Clean Water Act, 33 U.S.C. § 1315(b)..... 18

Clean Water Act, 33 U.S.C. § 1329.....17

Clean Water Act, 33 U.S.C. § 1342..... 5

Clean Water Act, 33 U.S.C. § 1344(a)..... 9

Clean Water Act, 33 U.S.C. § 1344(f)(2)(F).....12

Clean Water Act, 33 U.S.C. § 1362(6)..... 5, 6, 9

Clean Water Act, 33 U.S.C. § 1362(7)..... 3, 5

Clean Water Act, 33 U.S.C. § 1362(12)..... 3, 5, 8

Clean Water Act, 33 U.S.C. § 1362(14)..... 5, 6, 7

Safe Drinking Water Act, 42 U.S.C. § 300(f)..... 17

Federal Regulations

40 C.F.R. § 131.20 (2003)..... 10

40 C.F.R. § 141.71(a)(2) (2003)..... 18

State Regulations

5 COLO. CODE REGS. § 1002-31.16, Table 1: Physical and Biological Parameters (2001)..... 19

5 COLO. CODE REGS. § 1002-39.2 (2001).....19

N.Y. COMP. CODES R. & REGS. TIT. 6, § 703.2 (1999).....17

Other Authorities

Brief Amici Curiae of the States of Colorado and New Mexico..... 21, 25, 27

Brief Amici Curiae of City of New York, et al..... 17

Brief Amici Curiae of the National Water Resources Association.....21, 26

Brief for the United States as Amicus Curiae Supporting Petitioner.....11, 20

Clean Water Act, 3 *Leg. Hist.* 532 (Senate Debate, Dec. 15,1977)..... 26

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H.R. REP. NO. 92-911, at 76-77 (1972)…….. 9

THE HISTORY OF ULSTER COUNTY 368-69 (Alphonso T. Clearwater ed., W.J. Van Deusen) (1907)……..…..15

Nearby Spots Where Skilled Fishermen Find Trout, N.Y. Times, Apr. 7, 1912……..……..16

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Petitioner's Brief, South Florida Water Management District v. Miccosukee Tribe of Indians, 2003 WL 22137015 (2003) (No. 02-626)……12, 21

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Where To Go For Trout, N.Y. Times, June 1, 1874……...16

123 Cong. Rec. 39, 212 (1977), *1977 Leg. Hist.* 532…. 26

INTERESTS OF AMICI CURIAE

Amici curiae submit this brief in support of respondents Miccosukee Tribe of Indians, et al., and ask the Court to affirm *Miccosukee Tribe of Indians v. South Florida Water Management District*, 280 F.3d 1364 (11th Cir. 2002).[1]

Amici include organizations of recreational anglers as well as local and national environmental protection groups, all of whom have a direct interest in safeguarding the quality of water in the United States. Among these *amici* are organizations whose members have had their ability to fish and otherwise enjoy specific natural rivers impaired by the transfer of polluted waters from one water body to another.

The transfers of waters containing pollutants from one water body to another threaten the quality of rivers and their fisheries throughout the United States. The Eleventh Circuit Court of Appeals decision should be affirmed because it is consistent with both the unambiguous language and the statutory purposes of the Clean Water Act ("CWA").

Amicus Trout Unlimited (TU) is a not-for-profit organization whose mission is to preserve, restore and protect North America's trout and salmon fisheries and their watersheds. TU has 135,000 members in the United States organized into more than 450 local chapters. TU members and chapters around the country work for improved fish habitat and water quality, including implementation of the

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[1] Pursuant to Rule 37.6 of this Court, amici represent that counsel for amici authored this brief in its entirety and that no person or entity other than amici and their representatives made any monetary contribution to the preparation or submission of this brief. The parties' counsel have consented to the filing of this brief, and letters reflecting that consent are submitted to the clerk's office with this brief.

Clean Water Act, in hundreds of watersheds across the country. One of TU's chapters is the Catskill Mountains Chapter ("CMCTU"), which is dedicated to conserving, protecting, and restoring the fisheries of the Catskills region, including the Esopus Creek, which was the subject the Second Circuit's decision in *Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481 (2d Cir. 2001) (*Catskill Mountains*). In addition, Trout Unlimited operates the Western Water Project in five intermountain west states. Its mission is to work primarily in state level water allocation and water quality processes to ensure healthy flows for trout fisheries.

Theodore Gordon Flyfishers, Inc., (TGF), The Catskill-Delaware Natural Water Alliance (C-DNWA), and Federated Sportsmen's Clubs of Ulster County, Inc., (FSC) are each regional organizations dedicated at least in part to conserving, preserving, and protecting the fisheries of New York's Catskill Mountains region. Riverkeeper, Inc., is a not-for-profit organization dedicated to the protection of the ecological, economic, aesthetic and recreation qualities of the Hudson River, its tributaries and watersheds.

CMCTU, TGF, C-DNWA, FSC, and Riverkeeper are the plaintiffs in *Catskill Mountains*. In that case, the Second Circuit held that the discharge of mud and silt through a water supply tunnel constitutes the discharge of a pollutant from a point source and therefore requires a permit under section 402 of the Clean Water Act. *See Catskill Mountains v. City of New York*. The *Catskill Mountains* plaintiffs subsequently prevailed at trial and established that New York City had discharged pollutants without a permit, ruining the Esopus Creek as a recreational trout fishery.

SUMMARY OF ARGUMENT

The plain language of the CWA supports the Eleventh Circuit's decision and compels affirming this case. The relevant language of the CWA prohibits the "addition" of a "pollutant" from a "point source" to "waters of the United States" without a permit. 33 U.S.C. §§ 1311(a), 1362(7), (12). Transporting a pollutant from one body of water and then discharging it through a point source into a separate body of water meets this definition squarely. The CWA does not qualify the permit requirement based on where the pollutant came from, nor does it create an exception to the permit requirement for transfers of polluted water from one water body to another. Indeed, the other two Circuit Courts of Appeals that have addressed this issue reached the same result as the Eleventh Circuit in this case.

Both the structure of the CWA and its declared national goal to restore and preserve the "integrity" of the nation's waters support affirming the Eleventh Circuit's holding that transferring and discharging polluted water falls within the National Pollutant Discharge Elimination System (NPDES) program. The paramount goal of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). One of the primary means of achieving this goal is the implementation of water quality standards by each of the states under CWA section 303. 33 U.S.C. § 1313. Successful implementation, primarily by the states, of the NPDES permit program has been the primary successful method of moving towards achieving water quality standards. Reversing the Eleventh Circuit's decision in this case would allow water diversion facilities, including ski snowmaking systems, industrial cooling systems, and water supply systems, to discharge potentially highly polluted water into unpolluted waters, all without any effective

regulation under the CWA. This will result in the violation of water quality standards in numerous water bodies around the country, while at the same time eliminating the states' primary tool for correcting water quality standards violations. The destruction of the recreational trout fishery on Esopus Creek in New York's Catskill Mountains – in violation of the water quality standards for turbidity established by the State of New York -- illustrates the need to enforce water quality standards at these inter-basin point source discharges, as do other examples across the country.

Section 101(g) of the Clean Water Act, 33 U.S.C. § 1251(g), which preserves to the States the authority to allocate water quantity and water rights, does not preclude the regulation of water quality through the NPDES permit program. This Court has previously upheld the primacy of the CWA's water quality regulations over the reservation of water allocation authority in *PUD No. 1 v. Washington Dep't of Ecology*, 511 U.S. 700 (1994). CWA regulation of water quality is perfectly consistent with State authority to allocate water quantities.

ARGUMENT

I

TRANSFERS OF POLLUTED WATER THAT IS MOVED FROM ONE WATER BODY AND THEN DISCHARGED INTO A SEPARATE WATER BODY MEET THE CLEAN WATER ACT'S DEFINITION OF "DISCHARGE OF A POLLUTANT" FROM A "POINT SOURCE."

A. The Transfer of Polluted Water From One Water Body and its Discharge into a Separate Water Body by Means of a Point Source Meets the Plain Meaning of the CWA § 301 Prohibition Against the Unpermitted "Addition" of a "Pollutant" from a "Point Source" to "Navigable Waters."

The bedrock objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a); *see generally PUD No.1, supra*. The primary means Congress included in the CWA to achieve that goal is a requirement that discharges of pollutants from point sources have permits. *See* 33 U.S.C. §§ 1311(a), 1342.

The phrase "discharge of a pollutant" is defined in the Act as "any addition of any pollutant to navigable waters from any point source." *See* 33 U.S.C. § 1362(12). The Act further elaborates the definitions of "pollutant," "navigable waters," and "point source." *See* 33 U.S.C. §§ 1362(6), (7), (14). The definition of a "pollutant" specifically includes "dredged spoil," as well as "rock" and "sand." 33 U.S.C. § 1362(6). A "point source" subject to regulation "means any discernible, confined and discrete conveyance," and its definition specifically includes a "tunnel" as well as a "channel" or "conduit." 33 U.S.C. § 1362(14).

The language of these provisions covers the transfer of pollutants from one water body and their discharge into a separate water body through a pipe, channel, or tunnel. In the case before the Court, the S-9 pumping station causes an "addition" of phosphorous to water conservation area 3A by means of a "discernible, confined, and discrete conveyance," namely a pipe. In the *Catskill Mountains* case, a "discernible, confined, and discrete conveyance," namely the Shandaken Tunnel, caused an "addition" of sediments and turbidity to the clear waters of the Esopus Creek. *See* 273 F. 3d at 493-94. In both situations, the point source adds to a water body a pollutant that was not there before, and that would not be there but for the point source.

Nowhere does the Clean Water Act exempt from the NPDES permit requirement the transfer of polluted waters to a different water body segment. That they are in fact covered by the program is demonstrated by language in a number of provisions in the statute. For example, the definition of "point source" in section 502 of the CWA includes tunnels, channels, and conduits – all water transfer structures, 33 U.S.C. § 1362(14).

Further, the statute does exclude certain specific water transfers from the NPDES permit requirement, without providing a blanket exception for all water transfers. For example, section 502 of the Act explicitly excludes from the category "discharge of a pollutant" from a point source two types of water transfer. First, "[t]he term 'pollutant' … does not mean … (B) water … injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well … if [the] State determines that such injection or disposal will not result in the degradation of ground or surface water resources." 33 U.S.C. 1362(6). Second, "[t]he term 'point source' … does not include agricultural stormwater

discharges and return flows from irrigated agriculture." 33 U.S.C. § 1362(14). Both of these exempted activities involve transferring water in circumstances in which they are likely to contain pollutants, and then discharging the potentially polluted water somewhere other than where it was withdrawn.

Since Congress specifically excluded these water transfers from the definition of a "point source," other water transfers must be presumed to be "point sources." This would be consistent with the result reached recently by the Ninth Circuit, where that court required a permit for the discharge of polluted ground water through a point source to a surface stream. *N. Plains Res. Council v. Fid. Exploration and Dev. Co.*, 325 F.3d 1155 (9th Cir. 2003); *cert. den.* 72 U.S.L.W. 3280 (Oct. 20, 2003). A contrary interpretation in *Miccosukee* would render the exclusions of certain water transfers in section 502 superfluous.

B. The Statutory Purpose, Legislative History and Structure of the Clean Water Act Compel a Conclusion that the Transfer of Polluted Water from One Body of Water and its Addition into a Separate Body of Water is a Discharge of a Pollutant from a Point Source.

Petitioner argues that the addition of phosphorus into Water Conservation Area 3A does not constitute an "addition of any pollutant [in]to navigable waters"' 33 U.S.C. § 1362(12), because the phosphorus is already present in another navigable water, the C-11 basin. As explained above, this argument has no support in the plain language of the statute. It also is contrary to the purposes of the CWA, its legislative history, and its structure.

The core objective of the Clean Water Act is "to restore and maintain the chemical, physical, and biological *integrity* of the Nation's waters." 33 U.S.C. § 1251(a) (emphasis added). The "integrity" language was critical to the Act's framers. As stated by the House Committee on Public Works in a report accompanying the House Bill on the Act:

> The word "integrity" as used is intended to convey a concept that refers to a condition in which the natural structure and function of ecosystems is maintained.... Although man is a "part of nature" and a product of evolution, "natural" is generally defined as that condition in existence before the activities of man invoked perturbations which prevented the system from returning to its original state of equilibrium.... Any change induced by man that overtaxes the ability of nature to restore conditions to "natural" or "original" is an unacceptable perturbation.

H. R. REP. NO. 92-911, at 76-77 (1972).

The transfer of water containing pollutants from one water body into another, unpolluted water body where that polluted water would never naturally flow destroys the "integrity" of the receiving water body. This is exactly the sort of "perturbation" of the natural order that the legislative history declared "unacceptable."

The wording of other relevant portions of the CWA shows Congress's intent to regulate the discharge of pollutants even though those pollutants may already be present in waters of the United States. Section 502 of the CWA includes "dredged spoil" in the definition of a "pollutant" subject to regulation, 33 U.S.C. § 1362(6), and section 404 of the CWA requires a permit for the deposit of "dredged . . . material" into navigable waters. 33 U.S.C. § 1344(a). Dredged spoil and dredged materials are materials typically removed from one body of water and deposited in another, or elsewhere in the same, body of water. Such pollutants are already present in navigable waters, yet their reintroduction is regulated by the CWA.

Finally, petitioner's argument that the addition of a pollutant to one body of water from another does not meet the definition of "discharge of a pollutant" is inconsistent with the provisions of the CWA related to water quality - based permitting and water quality standards. Those provisions likewise compel the conclusion that the CWA regulates the introduction of pollutants by point sources into individual water bodies.

The CWA provides for NPDES permit standards based both on what is technologically achievable for particular point sources (technology based permitting) and the permit limitations needed to achieve water quality standards. *See* 33 U.S.C. § 1311. The statute's mechanisms for implementing water quality based permitting take place on a water-body-by-water-body basis, in a fashion completely inconsistent with the petitioner's argument. Section 303 requires states to establish water quality standards for each water body in the state. 33 U.S.C. § 1313; *see also* 40 C.F.R. § 131.20 (2003). These water quality standards then form the basis for water quality - based permit limitations for point sources discharging into those individual bodies of water. *See* 33 U.S.C. § 1312, 40 C.F.R. § 131.20 (2003). Further, section 303(d) requires each state to identify each water body segment in the state that fails to meet water quality standards, and, among other things, to revise NPDES permits so that their effluent limitations are designed to achieve the water quality standards for those specific bodies of water. 33 U.S.C. § 1313(d)(4).

The water quality standards and standard-based permitting require evaluating individual bodies of water and setting permit limitations for discharges into individual bodies of water. This structure fully supports the Eleventh Circuit's conclusion that "addition" of a pollutant means addition from the outside world, where "outside world" includes "any place outside the *particular* water body to which pollutants are introduced." *See Miccosukee Tribe,* 280 F.3d at 1368 n.5 (quoting *Catskill Mountains*, 273 F.3d at 491) (emphasis added).

CWA section 303 not only requires the vast array of water quality standards that states have adopted for their thousands of water body segments, but its mandate requires this Court to reject the notion that "'the waters of the United

States' should be viewed as a whole for purposes of NPDES permitting requirements" proffered in the Solicitor's amicus brief in support of petitioner. *Brief for the United States as Amicus Curiae supporting Petitioner*, p. 19. To suggest that a polluted water body's water is not a pollutant when discharged into a pristine water body because they are part of "a whole" makes a mockery of the states' efforts to adopt different classifications and criteria on a segment-by-segment basis.

C. *National Wildlife Federation v. Gorsuch* and *National Wildlife Federation v. Consumer's Power* Dealt Solely with Movement of Water Within a Water Body Segment, and Gave Inappropriate Deference to an Informal EPA Interpretation

Petitioner and its supporting *amici* argue that the decisions of the First, Second, and Eleventh Circuits in *Dubois v. United States Dep't of Agriculture*, 102 F.3d 1273, 1296-99 (1st Cir. 1996), *cert. denied*, 521 U.S. 1119 (1997), *Catskill Mountains*, and *Miccosukee*, respectively depart from the "established" precedents of *Nat'l Wildlife Fed'n v. Gorsuch,* 693 F.2d 156 (D.C. Circ. 1982), and *Na'l Wildlife Fed'n v. Consumers Power*, 862 F.2d 580 (6th Cir. 1988). This argument ignores the important factual distinction between *Gorsuch* and the water transfers involved in the more recent cases, as well as the fact that *Gorsuch* was decided based on *Chevron*-style deference to which EPA regulatory documents would not be entitled under current law. *See Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984).

Gorsuch considered whether dams through which water passed from upstream to downstream constituted point

sources under the CWA.[2] *Consumers Power* addressed the same issue with respect to a pump storage station that pumped water uphill and then returned it to the same water body. The Second Circuit in *Catskill Mountains* held that these two cases did not apply to the transfer of polluted water from one water body into a completely different one. *Catskill Mountains,* 273 F. 3d at 491-93.

While acknowledging the *Gorsuch* gloss on the statutory term of "addition" to require an addition "from the outside world," the Second Circuit drew the inescapable conclusion that polluted water transferred miles under a mountain range is indeed an addition from the world outside the receiving waters:

> The present case, however, strains past the breaking point the assumption of "sameness" made by the *Gorsuch* and *Consumers Power* courts. Here, water is artificially diverted from its natural course and travels several miles from the Reservoir through Shandaken Tunnel to Esopus Creek, a body of water utterly unrelated in any relevant sense to the

[2] The D.C. Circuit held in *Gorsuch* that the discharge from the dam did not constitute an addition of a pollutant. *See Gorsuch*, 693 F.2d 156. As a result, dam discharges of the type reviewed in *Gorsuch* are today considered nonpoint sources of pollution. Petitioners argue that CWA § 304(f)(2)(F), 33 U.S.C. § 1344(f)(2)(F) should govern the transfer of pollutants through a point source to a different water body. (Petitioner's Brief [hereinafter "Pet'r Br."] at 29-30, 33, *South Florida Water Mgmt. Dist. V. Miccosukee Tribe of Indians*, 2003 WL 22137015 (2003 (No. 02-626) This Court should reject this interpretation as a gross expansion of the reach of CWA § 304 (f)(2)(F), 33 U.S.C. § 1344(f)(2)(F), which properly reaches those fact situations analogous to the ones at issue in *Gorsuch* or *Consumers Power*, but not situations involving the point-source discharge of pollutants from one water to another, such as presented in the instant case or *Catskill Mountains*.

> Schoharie Reservoir and its watershed. No one can reasonably argue that the water in the Reservoir and the Esopus are in any sense the "same," such that "addition" of one to the other is a logical impossibility.
>
> *Id.* at 492.

Moreover, the *Gorsuch* decision was based almost exclusively on deference to informal EPA interpretations of the term "addition." *See Gorsuch*, 693 F.2d at 167-74. Those types of informal agency interpretations are no longer entitled to *Chevron* deference under this Court's decision in *Christensen v. Harris County*, 529 U.S. 576 (2000). *Gorsuch* and *Consumer's Power* not only presented critically different facts, they are also of questionable precedential value under current law.

II

A HOLDING THAT DISCHARGES OF POLLUTED WATER INTO SPECIFIC WATER BODIES DOES NOT REQUIRE AN NPDES PERMIT IF THAT WATER IS TRANSPORTED FROM A SEPARATE WATER BODY WILL RESULT IN THE SEVERE IMPAIRMENT OF WATER BODIES RECEIVING SUCH DISCHARGES.

A. If Point Source Discharges of Polluted Water Transferred from Separate Water Bodies are Exempted from the CWA's Permit Requirement, Achieving Water Quality Standards in Some Water Bodies Receiving Such Discharges will Become Impossible.

As discussed above, in order to implement its statutory goal of "water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water," 33 U.S.C. § 1251(a)(2), the CWA establishes a system of water quality-based point source permitting and directs states to establish water quality standards for all water bodies. *See* 33 U.S.C. § 1313; *see generally PUD No. 1 v. Washington Dep't of Ecology,* 511 U.S. 700, 704-705 (1994). Clean Water Act section 302 specifically provides for incorporation of more stringent water quality-based effluent limitations when uniform, technology based limitations are insufficient to achieve water quality standards. 33 U.S.C. § 1312.

As noted by this Court in *EPA v. California ex rel. State Water Res. Control Bd.,* 426 U.S. 200, 205n.12 (1976), "numerous point sources, despite individual compliance with [technology based] effluent limitations, may be further regulated to prevent water quality from falling below acceptable levels." The CWA also sets up a number of planning measures and programs designed to allow each state to focus its efforts on water bodies that do not achieve water quality standards. *See, e.g.,* 33 U.S.C. § 1313(e) Continuing planning process [for achieving water quality]; 33 U.S.C. § 1315 (state reports on water quality).

The position argued by petitioners and their supporting *amici* in this case would, in effect, nullify these programs for waters receiving polluted water from separate water bodies. The total maximum daily load allocations set out in section 303(d) are specifically designed to operate through individual point source permits on individual water bodies. If transfers of polluted waters between distinct water bodies are immune from NPDES permitting, as proposed by the petitioners, then there will always be some portion of pollution in the receiving water body that cannot be

addressed through either point source or non-point source programs, since the water transfer is clearly a point source but would be exempt from regulation as such. Under the best of circumstances, the state and other polluters will have to incur considerable additional expense to further reduce other sources of the pollutant in the watershed. In many cases, this may require permitted point sources which have already invested in pollution controls to reconfigure or replace those controls to address new water quality conditions created by an inter-basin transfer of pollutants the state has neither planned for nor approved. In situations where the unpermitted point source discharge by itself causes a water quality standard violation (as in the *Catskill Mountains* case discussed below), then there will be no means of addressing the violation other than attempted voluntary measures, which have proven ineffective.

B. The *Catskill Mountains* Case Exemplifies the Need to Require Permits for Point Source Discharges of Polluted Waters in Order to Achieve Water Quality Standards.

In *Catskill Mountains*, the Second Circuit applied the plain meaning of the CWA § 301 prohibition to require regulation of New York City's transfer of muddy, silt laden water into a pristine trout stream. *See Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F. 3d 481 (2001). The factual circumstances of *Catskill Mountain*s illustrate the necessity of including these transfers in the CWA permitting scheme to achieve water quality standards.

The Esopus Creek is a world class trout stream that has attracted anglers to New York's Catskill Mountains since the nineteenth century. *See, e.g.,* THE HISTORY OF ULSTER COUNTY 368-69 (Alphonso T. Clearwater ed.,

W.J. Van Deusen) (1907); *Nearby Spots Where Skilled Fishermen Find Trout*, N.Y. Times, Apr. 7, 1912 at 11; *Where To Go For Trout*, N.Y. Times, June 1, 1874 at 8. Above the Shandaken Tunnel, the Esopus Creek is naturally clearer than the water reaching the creek through the Shandaken Tunnel. *See Catskill Mountains*, 273 F.3d at 485.

New York City operates the Shandaken Tunnel as part of its water supply system. The eighteen mile long tunnel traverses a mountain range and diverts water from the Schoharie Reservoir to the Esopus Creek. The Esopus Creek and the Schoharie Reservoir are two different and distinct water bodies located in two different and distinct watersheds. Water from the Schoharie Reservoir naturally flows north into the Mohawk River, whereas the Esopus Creek naturally flows southeast into the Ashqkan Reservoir and the Hudson River. *Id.*

The waters of the Schoharie Reservoir are polluted with fine red clay particles, which cause visible turbidity. This pollution is not purely "natural," but is caused in significant part by human activities in the Schoharie watershed. *See Catskill Mountains Chapter of Trout Unlimited v. City of New York,* 244 F.Supp.2d 41, 46-47 (N.D.N.Y. 2003).

The discharge of this muddy water transforms the Esopus Creek from a clear mountain trout stream to a muddy torrent. As established at the trial of the *Catskill Mountains* case, the turbid discharge to the Esopus Creek has made dry fly fishing difficult, because the trout cannot see cast flies, and dangerous, because the fishermen cannot see the bottom of the creek. *Id.* at 46. This turbid discharge violates New York's water quality standards, which preclude any turbidity "that will cause a substantial visible contrast to natural

conditions." N.Y. COMP. CODES R. & REGS. TIT. 6, § 703.2 (1999).

New York City's transfer of polluted water through the Shandaken Tunnel thus precludes the achievement of the water quality standards needed to protect the trout fishery and recreational uses of the Esopus Creek. The only hope of achieving this standard is for the New York State Department of Environmental Conservation to develop a permit with appropriate turbidity limits for the Shandaken Tunnel discharge – exactly the relief ordered by the District Court in the *Catskill Mountains* case. 244 F.Supp. 2d at 55-56.

New York City, in its *amicus* brief in support of petitioners, argues that the water quality violations caused by its inter-basin transfers should be addressed by controls on non-point sources, or under the Safe Drinking Water Act, 42 U.S.C. § 300(f), rather than permitting these transfers as point source discharges under CWA § 301. *Brief Amici Curiae of City of New York, et al.* at 15-21. New York City ignores the fact that neither the non-point source management programs contemplated by 33 U.S.C. § 1329, nor the Safe Drinking Water Act addresses the water quality standards violations caused by inter-basin transfers.

The non-point source controls invoked by New York City simply have not been effective to restore the nation's waters as sought by the Clean Water Act. The CWA declares the "interim" goal of assuring water quality sufficient to protect recreational uses (such as trout fishing on the Esopus Creek) no later than 1983. 33 U.S.C. § 1251(a)(2). Yet 20 years later, despite the non-point source control provisions of 33 U.S.C. § 1329, water quality violations persist on the Esopus Creek as well as in the Water Conservation Area 3A of the Everglades; in each case

due to discharges from clearly identifiable point sources. Indeed, EPA, in its latest report under CWA § 305(b), identifies siltation and nutrients (such as phosphorous) as the top causes of impairment of the nation's waters, and identifies uncontrolled nonpoint source pollution as the "leading source" of impairment of the nation's waters. *See* U.S. EPA, 2000 NATIONAL WATER QUALITY INVENTORY REPORT at ES-3 (2002) *available at* http://www.epa.gov/305b/2000report/execsum.pdf (last visited November 9, 2003); 33 U.S.C. § 1315(b). Clearly, non-point source management practices are no substitute for regulation of these transfers as point sources.

Similarly, the Safe Drinking Water Act provides no possible solution to these violations of water quality standards. The SDWA imposes water quality standards at the point of entry to a closed water supply distribution system – the first point of disinfection – and makes no effort to control the water quality upstream. 40 C.F.R. § 141.71(a)(2) (2003). Regulation of surface water quality for recreational use and fisheries protection is the ambit of the Clean Water Act, not the SDWA, and it is the Clean Water Act's regulation of point sources that applies to these cases by its terms and by its comprehensive scheme for achievement of water quality standards.

C. A Proposed Transfer of Colorado River Water Further Illustrates the Extent to Which Transfers of Polluted Water Damage Water Quality.

Were this Court to reverse the 11th Circuit's holding in *Miccosukee*, states would lose the ability to protect some of their cleanest waters from potentially devastating discharges of polluted waters through diversion structures. For example, in 2003, the Colorado General Assembly appropriated $500,000 to the Colorado Water Conservation

Board (CWCB) to do a reconnaissance study for the Colorado River Return Project,[3] a 250,000 to 750,000 acre-foot water diversion from the 15-mile reach of the Colorado River between its confluence with the Gunnison River and the Utah border. The diverted water would be piped to the Continental Divide and then discharged, some back into the headwaters of the Colorado River, but most to the headwaters of the South Platte or Arkansas Rivers to run via gravity down to Colorado's population centers.[4]

The project would discharge levels of salinity and selenium too high, and water too warm for the receiving headwaters' cold water fisheries. The discharges would cause violations of the water quality standards for these headwaters streams, and would damage their ecological health. The project's source segment is warm water while the receiving headwaters are cold. Under Colorado water quality standards, cold water fisheries must maintain temperatures below 20°C, whereas warm water fisheries can sustain temperatures no higher than 30°C. 5 COLO. CODE REGS. § 1002-31.16, Table 1: Physical and Biological Parameters (2001). The State's Salinity Regulation explains, "Salinity … occurs at low concentrations in the headwaters … however, salinity concentrations increase downstream." 5 COLO. CODE REGS. § 1002-39.2 (2001). Measured levels of salinity in the source segment average 600-700 milligrams per liter.[5] The healthy cold water fisheries of Colorado's headwaters, where salinity levels

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[3] S.B. 03-110 § 15, 64th Colo. Gen. Assem. Reg. Sess., (Colo. 2003).

[4] Colorado Water Conservation Board (CWCB), Scope of Work for a Study of the Colorado River Return Project (CRRP) at 2. (*available at* http//www.cwcb.state.co.us/SecB/CRRS_Final_Scope.pdf) (last visited November 9, 2003).

[5] USGS National Water Quality Assessment Data Upper Colorado River Basin, Station # 09163500 Colorado River near the Colorado-Utah State line, *available at* http://waterdata.usgs.gov/co/nwis (last visited November 9, 2003)

average 50 mg/l, cannot survive at such levels.[6] Finally, data compiled by the U.S. Geological Survey in October 2002 revealed that concentrations of another pollutant, selenium, measure approximately 5.8 micrograms per liter, exceeding the source segment's water quality standard.[7] Concentrations between 4.6 and 5.0 micrograms per liter would be toxic to cold water fish.[8]

Because of the enormously detrimental implications of putting large quantities of saline, selenium-laced warm waters into healthy coldwater fisheries, the project currently proposes treatment to address the disparities in quality and temperature between the source and receiving waters.[9] However, if this Court were to hold that the discharge of polluted water diverted from one water segment to another does not require an NPDES permit, Colorado would no longer have to require a discharge permit for the Colorado River Return Project, resulting in devastation to whichever headwaters streams would be forced to receive the warm, polluted Colorado River water.

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[6] *See,* U.S.G.S. – N.A.W.Q.A. Water Quality in the Upper Colorado River Basin, Major Findings, *available at:* http://water.usgs.gov/pubs/circ/circ1214/major_findings2.htm (last visited November 4, 2003) (USGS Upper Colorado River Basin Findings).

[7] R.M. Crowfoot et. al., USGS, National Water Quality Assessment Program, Water Resources Data, Colorado, Water Year 2002 Vol. 2 Colorado River Basin.

[8] USGS Upper Colorado River Basin Findings, *supra*.

[9] Colorado Water Conservation Board Power Point Presentation, Colorado River return Project Facilities, *available at:* http:/cwcb.state.co.us?SecB/Open%20House%20Exhibits%20show_files/frame.htm (slides 3,6,7).

III

THE ELEVENTH CIRCUIT'S OPINION IN *MICCOSUKEE* WILL ALLOW APPROPRIATE WATER QUALITY REGULATION WITHOUT INFRINGING ON STATES' POWERS TO ALLOCATE WATER.

In the proceedings below, no party argued the primacy of state water allocation systems before the 11th Circuit, and that court's opinion is silent on the issue. However, before this Court, petitioner argues under section 101(g) of the CWA that the 11th Circuit's decision impinges upon water allocation issues reserved solely to the states. *Pet'r Br.* at 34-35; 33 U.S.C. § 1251(g). Several of the *amici* who filed in support of petitioner have gone further, suggesting that a ruling to uphold *Miccosukee* would weaken the Clean Water Act's reservation of state power over water allocation and wreak havoc on the exercise of water rights. *Brief Amici Curiae of the States of Colorado and New Mexico* (CO-NM Brief) at 20, *Brief Amici Curiae of the National Water Resources Association, et al.* (NWRA Brief) at 17.

This Court must reject petitioner's and its *amicis'* water rights arguments as contrary both to the Clean Water Act and the reality of current state implementation. First, the Clean Water Act does not exempt the exercise of water rights from permitting for water pollution control objectives; in fact, this Court has expressly affirmed a state's ability to condition the exercise of water rights for water pollution control purposes. *PUD No. 1 v. Washington Dep't of Ecology,* 511 U.S. 700, 701-702 (1994). Second, water rights transfers are in fact already widely subject to CWA permitting without significant adverse effect, albeit pursuant to CWA §404, governing discharges of dredged and fill material.

A. Clean Water Act Section 101(g) Presumes Legitimate Regulation of Water Quality.

As noted, the CWA seeks its ultimate goals of achieving acceptable water quality throughout the nation through a mix of related programs, including the requirements: (1) to adopt water quality standards protective of all waters of the United States, (2) to implement mandatory permits for discharges of pollutants from point sources, and (3) to address diffuse sources of pollution through non-point programs, which may be voluntary. The Act assigns primary responsibility for implementation of this program to the states, with periodic oversight from EPA.

Notwithstanding the breadth of the Act, in 1977 amendments to the CWA, Congress declared its policy that neither state authority "to allocate quantities of water" nor state-established "rights to quantities of water" would be "superceded, abrogated or impaired" by virtue of the CWA. 33 U.S.C. § 1251(g). Even here, however, Congress recognized the connection between water quality and water quantity, adding into this declaration that: "Federal agencies shall cooperate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution *in concert with* programs for managing water resources." *Id.* (emphasis added). Thus, Congress coupled its admonition against interference with state authority over water rights with a directive to develop solutions that respect existing water allocation systems while simultaneously preventing and reducing pollution of the nation's waters.

Requiring permits for transferring polluted water in no way impairs state authority to allocate water or infringes on water rights themselves. A party holding a right in water that happens to be polluted still holds that right; the permit requirement simply means that if the party wishes to exercise

that right in a specific way – by moving the water to another water body and discharging it through a point source – the party will have to obtain a permit relating to the quality (but not the quantity) of the water being moved.

Nor does state water allocation law provide an adequate substitute to ensure protection of water quality standards. For example, in Colorado, other water rights holders may be protected from the discharge of water so polluted as to make it impossible for these water rights holders to apply the water to their beneficial uses. *City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 91 (Colo. 1996). However, this principle will not protect instream recreation and fisheries uses because, with very limited exceptions, Colorado does not allow instream recreation or fishery water rights. *Id.* at 93-94. Moreover, state water quality law is subordinate to state water law. *Id.* at 90.

B. The Clean Water Act Requires State Water Allocation Systems to Accommodate Legitimate Water Quality Controls.

In *PUD No. 1 of Jefferson County v. Washington Dept. of Ecology,* 511 U.S. 700, this Court rejected the assertion that water quality control pursuant to the Clean Water Act cannot affect some aspects of the manner in which a water right is exercised. The Court found the distinction between water quality and water quantity control to be "artificial ... since a sufficient lowering of quantity could destroy all of a river's designated uses, and since the Act recognizes that reduced stream flow can constitute water pollution." *PUD No. 1* at 701. Further, this Court stated that § 101(g) of the Act "preserve[s] the authority of each State to allocate water quantity as between users, [but does] not limit the scope of water pollution controls that may be imposed on users who have obtained, pursuant to state law, a water

allocation." *Id.* at 720. Rather, this Court noted that permit or license conditions imposed through Clean Water Act authorities "merely determine[] the nature of the use to which that proprietary right may be put under the Clean Water Act." *PUD No. 1,* at 721.

Lower courts have uniformly come to the same conclusion – that §101(g) does not limit water restrictions on the exercise of water rights, provided that the restriction serves a legitimate purpose under the Clean Water Act and does not abrogate the underlying water right or water allocation system. For example, in *United States v. Akers,* 785 F.2d 814 (9th Cir. 1986), the 9th Circuit held that any incidental effect of a Clean Water Act permit requirement on a farmer's rights to state-allocated water was justified because protection of wetlands providing seasonal refuge for numerous species, including endangered species, was the type of "legitimate purpose" for which the Clean Water Act was intended. *Akers* at 818 (quoting *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 315 (1982)).

The court further determined that the statute as a whole makes clear that, "where both the state's interest in allocating water and the federal government's interest in protecting the environment are implicated, Congress intended an accommodation. Such accommodations are best reached in the individual permitting process." *Akers,* 785 F.2d at 821.

Similarly, in *Riverside Irrigation Dist. v. Andrews,* the 10th Circuit defined § 101(g) merely as a "general policy statement" which could not nullify an express permitting provision even if the provision seemed inconsistent with the broadly stated purpose of the policy statement articulated in 101(g). *Riverside*, 758 F.2d 508, 513 (1985) (quoting *Connecticut Light & Power Co. v. Fed. Power Comm'n,* 324

U.S. 515, 527 (1945)). While in *Riverside*, the permit at issue was pursuant to CWA § 404, the logic applies equally to the section 402 permitting at issue in this case.[10]

Even in *Nat'l Wildlife Fed'n v. Gorsuch,* 693 F. 2d 156 (1982), a case petitioners cite to support their arguments, the D.C. Circuit interpreted section 101 (g) not to foreclose regulators from imposing pollution control requirements on the exercise of water rights. The court stated that section 101(g) indicated that Congress did not want to interfere "any more than necessary" with state water management. *Gorsuch* 693 F.2d at 178. Thus, to the extent that the D.C. Circuit determined that the Clean Water Act required no NPDES permit for a dam that blocks water in a river channel, stores it and then releases it back downstream, the Court did not find that Clean Water Act regulation could not reach the exercise of a water right, but rather that there was no addition of a pollutant in that factual situation. *Id.* at 179, 183.

C. Congress Never Intended To Preclude Regulation of Water Rights For Water Quality Protection.

The legislative history of section 101(g) provides further support for Congress' intent not to preclude regulation of transfers of polluted water to achieve water pollution control objectives. Senator Wallop, who sponsored

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[10] The States of Colorado and New Mexico argue in their amicus brief in support of petitioners that upholding the 11th Circuit's opinion in *Miccosukee* would lead to violations of inter-state water compacts. *Brief of Colorado & New Mexico*, pp. 20-22. The court in *Riverside* disagreed with a similar argument made there, noting that the requirement for a permit "has not denied Colorado its right to water use under the South Platte River Compact." 758 F.2d at 513-14.

the amendment adding section 101(g), stated that it was not intended to "take precedence over legitimate and necessary water quality considerations." 123 Cong. Rec. 39, 212 (1977), *1977 Leg. Hist.* 532. Senator Wallop explained that the requirements of section 402 and 404 permits; for instance, may incidentally affect individual water rights; that it was not the purpose of the amendment to prohibit those incidental effects so long as those effects were prompted by legitimate and necessary water quality considerations; and that he did not intend section 101(g) to interfere with the legitimate water pollution control purposes of the Clean Water Act. 3 *Leg. Hist.* 532 (Senate Debate, Dec. 15, 1977).

In addition, to the extent that petitioner and some of its amici suggest that Congress intended for the Clean Water Act never to affect the exercise of a water right, they simply overstate their case. *See, e.g.,* NWRA Brief at 14. This is so because diversion and transfer facilities constructed to allow entities to exercise their water rights are in fact widely regulated pursuant to CWA § 404, which requires entities discharging dredged or fill material into the nation's waters to obtain a permit. 33 U.S.C. § 1344. As was the case in *Riverside, supra,* most such activities operate pursuant to general permits which require no more than notification. However, most larger diversion and transfer facilities do require individual permits. Yet, it is rare indeed that this permit program interferes with the exercise of the water right. *See, Alameda Water & Sanitation Dist. v. Reilly*, 930 F.Supp. 486, 493 (D. Colo. 1996).

Just as the 404 permit program has not stopped water diversions and transfers, nor will broader application of the NPDES program. Notwithstanding *amici*'s claims that water projects across the West will be shut down, *see, e.g., CO-NM Brief at 3-4,* the requirements of the CWA are unlikely to produce such dire results. This is so not only because most

produce such dire results. This is so not only because most water transfers that would require permits would operate pursuant to general NPDES permits, just as do hundreds of thousands of stormwater discharges operating under NPDES permits, but also because, as *amici* note, most water transfers do not result in violations of water quality standards. Therefore, even where an activity might need an individual NPDES permit, most such activities' permit conditions will not require treatment to meet water quality standards. Only where the discharge of pollutants causes violations of a receiving stream's water quality standards will there be any treatment required. And, in those relatively limited, but important situations, the CWA will require treatment to protect the integrity of the nation's waters.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge the Court to affirm the decision of the Eleventh Circuit Court of Appeals applying the Clean Water Act's point source permitting requirements to the transfer of polluted water between distinct water bodies.

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